

enough to hope to find tin there. After some conversation a Mr. O'Hara, an employee of the plaintiffs, visited the land in question and made a report. On the strength of this a Mr. Hazlitt, Managing Director of the plaintiff Company, wrote a letter on February 5th. I think it is clear that the report and the letter both contemplate boring on the land of the defendant and on some adjoining unalienated land Lot No. 1131. To this the defendant replied on February 7th. The defendant paid \$5,000 in advance, and the work began on April 9th and continued until the end of May by which time work was abandoned with 14 holes bored. The cost according to the claim of the plaintiffs was \$12,237.18, and they claim the balance "for work done and expense incurred by the plaintiffs for the defendant at his request." The claim includes, in addition, remuneration for the plaintiffs.

The defence alleges that the letter of April 5th constituted an offer which was accepted by the defendant with the result that the plaintiffs were obliged to bore 60 holes at a maximum charge of \$10,000 and claims that the defendant is only liable pro rata for the work done at the time when prospecting was abandoned. If this is so, it is clear that the defendant has overpaid, although certain expenditure, e.g. the transport of labour and tools to and from the site, would be the same whether much or little work were done. On the other hand, even if the letter of April 5th did not constitute an offer, I think that it had the effect of limiting the authority of the plaintiffs to incur expenditure. The estimate of the cost of \$6,000 to \$10,000 was the opinion of an expert on which the defendant relied when he decided whether or not to go on with the prospecting. The report of Mr. O'Hara indicated that the work would be difficult and it is hard to see on what the estimate of \$10,000 as the maximum cost was based. In any event as soon as prospecting began it was clear that the cost would be much heavier than the estimate and from the beginning the recovery of tin was either nothing or insignificant. It seems that in the circumstances it was clearly the duty of the plaintiffs to inform the defendant of what was going on and to find out his wishes. If the work had been completed the total cost would have been \$40,000 or more — a very different sort of a proposition to that envisaged on April 5th. Actually no communication was made to the defendant until May 14th when a telegram was sent asking for more money and no letter was received by the defendant until June after the work had been abandoned. Two letters had been sent towards the end of May but they were wrongly addressed and seem to have been returned. But in any event these letters were sent much too late, after most of the expenditure had been incurred. If

the plaintiffs had communicated with the defendant, as they should have done, he would have been able to stop the work before most of this useless expenditure had been incurred. I do not think that in any event the defendant is liable for expenditure incurred after the plaintiffs had failed to communicate with him, particularly as the letter of April 5th contemplated cessation of work after boring a few holes. I do not think that the plaintiffs are entitled to more than \$4,500.

As a result there will be judgment for the defendant on the claim and the counterclaim, the defendant is entitled to \$500 with costs on both claim and counterclaim.

Judgment for the defendant.

**Re LOVENS KEMISKE FABRIK VED. A.
KONSTED'S APPLICATION FOR
REGISTRATION OF TRADE MARK
"LEOCILLIN".**

[Trade Mark Application (Harrison, Registrar)
July 17, 1953]

[Singapore — Trade Mark Application No. 13828]

*Trade Marks Ordinance, 1938 — Opposition to
registration — Mark likely to deceive or cause con-
fusion — Principles to apply.*

The applicants were seeking to register in Part A of the Trade Marks Register a mark consisting of the word "LEOCILLIN", in respect of "Pharmaceutical preparations and substances consisting of or containing penicillin". The applicants had not actually used the mark in Singapore up to the date of this application.

The opponents had used in Singapore since 1949, a mark consisting of the word "LEDERCILLIN" in respect of medicinal and pharmaceutical preparations (including penicillin), but had not applied for the registration of this mark in Singapore.

The opponents lodged an objection against the Registration of the applicants' mark on the grounds of the similarity to the mark "LEDERCILLIN", and to its being likely to deceive or cause confusion.

Held: (1) in deciding whether the registration of the mark would be likely to deceive or cause confusion all the circumstances of the case should be considered and in particular the type of person who would deal in the goods, and the manner in which the goods would be dealt with; (2) as regards penicillin products, whilst actual sales would be made chiefly to medical practitioners, the drugs would be handled extensively by chemists, their assistants, and Sisters and Nurses in hospitals and clinics. Many of these latter persons would not be very conversant with the English language, and the risks of their confusing two such similar names as Leocillin and Ledericillin would be considerable; (3) these products were likely to be supplied in small bottles, with the mark printed in small type, which made the risk of confusing two such similar words greater; (4) it was particularly important in the public interest that there should not be any risk of confusion between trade marks in the case of drugs; (5) in all the circumstances the applicants, although acting in good faith, had not discharged the onus which was on them to satisfy the Registrar that the mark was a proper one for registration, and the Application for Registration should not therefore proceed.

Cases referred to:—

(1) *Eno v. Dunn* 10 R.P.C. 261.

- (2) *Bayer Products Ltd. v. A. Wander Ltd.* 64 R.P.C. 194.
- (3) *Sandow Ltd.'s Application* 31 R.P.C. 196.
- (4) *Medowell's Application* 43 R.P.C. 313 at p. 327.

OPPOSITION to the registration of a trade mark under the Trade Marks Ordinance, 1938.

J. B. Maxwell for the applicants.

T. E. Atkinson for the opponents.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Harrison, Registrar:—This is a opposition by Messrs. The American Cyanamid Company of 30 Rockefeller Plaza, City and State of New York, Manufacturers, to an application by Messrs. Lovens Kemiske Fabrik Ved. A. Konsted of 19, Bronshøjvej, Copenhagen, Denmark, for the registration of a trade mark in Class 5, in respect of, "Medicinal and pharmaceutical preparations."

The trade mark consists of the word "LEOCILLIN". The grounds of opposition are as follows:—

1. We use and since July 1949, we have extensively used in Singapore a mark consisting of the word "LEDERCILLIN" as a Trade Mark in our business as manufacturing chemists in respect of medicinal and pharmaceutical preparations, and we have also used the said mark in our advertisements and price lists in connection with our said business.

2. The mark which the applicants by their application above referred to are seeking to register so nearly resembles our said Trade Mark referred to in paragraph 1 hereof as to be likely to deceive or cause confusion.

Upon receipt of the opposition, the applicants amended the specification of goods so as to read:—

"Pharmaceutical preparations and substances consisting of or containing penicillin."

This in no way affected the present opposition, but was done by arrangement with the proprietors of another and different mark.

In the counter-statement the applicants replied:—

1. Our Trade Mark "LEOCILLIN" does not bear such close resemblance to the Opposer's Trade Mark "LEDERCILLIN" as to be calculated to lead to deception or to cause confusion.

2. "CILLIN" or "CYLIN" is a common suffix for pharmaceutical products as indicating a penicillin content.

3. We have offered to amend our application by restricting the specification of goods to read:—

'Pharmaceutical preparations and substances consisting of or containing penicillin.'

but the opponents have declined to withdraw their opposition. We are willing for the said amendment to be made.

4. Our goods sold under the Trade Mark "LEOCILLIN" are not and will not be available to the general public but are almost invariably sold on Doctor's Prescriptions or to Hospitals and like Institutions where they are ordered under medical direction. Doctors and Chemists who are habitually prescribing or dispensing drugs, many of which have similar names, are well used to distinguishing between one drug and another and are

not likely to confuse "LEOCILLIN" with "LEDERCILLIN" or vice versa.

5. We are the registered proprietors of the Trade Mark "LEO" No. 13827 registered in respect of "Medicinal and pharmaceutical preparations". The words "LEO" and "LEOCILLIN" have been adopted by us because part of our title is "Lovens Kemiske Fabrik" meaning "Lion Chemical Factory".

6. My Company do not admit any of the statements contained in the grounds of opposition.

Evidence was duly lodged by both parties and counsel were heard in the matter.

Dealing first with the evidence on behalf of the opponents, I think this may be divided into three parts. Certain persons declare that they have for some time past dealt in and supplied "LEDERCILLIN" preparations. Secondly that the goods would normally be supplied to Doctors and Druggists and not direct to the general public and are referred to by the Trade name without reference to the name of the manufacturer. This does not appear to be denied. Thirdly that the use of the Trade Marks "LEDERCILLIN" and "LEOCILLIN" by different persons upon similar goods would be likely to cause confusion. I will deal with this point later.

In reply, the applicants tender evidence to refute the likelihood of confusion and in addition, Mr. Cecil Treschow gives us the reasons for adopting his mark and points out the several differences between the two words concerned.

The likelihood of confusion is of course the question which I am asked to decide for there appears to be no other cause of action.

I am to bear in mind that I must decide this question upon the evidence before me and that the onus is upon the applicant to satisfy me that if his mark is entered in the Register there will be no such likelihood (*Lord Watson in Eno v. Dunn*⁽¹⁾).

In several of the Declarations filed in evidence, I find that the declarant is of opinion that the two words would not likely to be confused. So far as this is his own opinion, confined to himself I take notice of this statement, but when it is applied to the likelihood of others being confused I cannot place much dependence upon it (see *Kerly on Trade Marks*, 7th Edn. page 506).

I must therefore take into consideration the likelihood of confusion in the mind of the person concerned.

Doctor MacGilchrist, a local practitioner, states that he is of opinion that it would be possible for a dispenser or other qualified person to confuse the words "LEOCILLIN" and "LEDERCILLIN" if written hurriedly by hand in a prescription or if referred to in a telephone conversation particularly in Singapore where many Chinese speaking persons would pronounce

the 'R' in "LEDERCILLIN" as an 'L'. If required urgently, medical practitioners frequently order prescriptions by telephone and, thereafter, forward the necessary written prescription. Mr. Hugo Emil Arnet says that in such prescriptions drugs are usually referred to only by their trade name without reference to the manufacturer's name, and he is of the opinion that not only do the words "LEDERCILLIN" and "LEOCILLIN" sound sufficiently similar to cause confusion but he is also of the opinion that when written in a prescription these words may appear sufficiently similar as to be confused. Such persons as doctors should exercise care.

On the other hand, Mr. Horace Arthur Coward, a member of the Pharmaceutical Society and a practising Pharmaceutical Chemist of No. 4 Stratford Road, London, W.8, England, has this to say, "Mr. Evans-Jackson wrote the words, "LEOCILLIN" and "LEDERCILLIN" on a sheet of paper and asked me if these words conveyed anything to me as a Chemist. I replied that both words indicated Penicillin or a Penicillin preparation. That I had not previously seen either word, but I would expect "LEDERCILLIN" to be a product of the American firm Lederle. That I had no knowledge as to the origin of "LEOCILLIN". Mr. Evans-Jackson asked me if I would confuse the two words. I replied no, that I know and use in my business words which in my opinion are closer to each other than "LEOCILLIN" and "LEDERCILLIN" are to each other. I have dispensed thousands of Doctor's prescriptions both written and given by telephone during the past seventeen years. To the best of my knowledge and belief I have never dispensed a prescription wrongly due to hurriedly or badly written prescriptions or to a misunderstanding on the telephone. I should not expect any qualified Chemist to make a mistake due to these cause."

Alexander Wright Fraser, a medical practitioner, also says, "I do not confuse the two words as the identifying prefix differs materially. The prefix "LEO" is the Latin for "Lion" whereas the prefix "LEDER" is meaningless except in so far as to German scholars it might imply "Leather". It has been suggested to me that doctors and dispensers may confuse the marks in the case of prescriptions written hurriedly by hand or referred to in telephone conversations. In my opinion, such a mistake is most unlikely to happen. The medical profession and chemists' dispensers are fully alive to the danger of mistakes being made in prescriptions and such occurrences are extremely rare. I do not know of any prescription written by me or ordered by me on the telephone which has been wrongly made up by reason of indistinct writing or indistinct

speech." Mr. George James Villiers Crosby of 2 Montague Square, London, W.1, a Doctor of Medicine has this to say, "The words "LEOCILLIN" and "LEDERCILLIN" are quite distinct from each other and I would not confuse them. The word "LEO" is the Latin word for "LION". The word "LEDER" has no meaning except to persons familiar with the German language who would recognise it as meaning leather. It has been suggested to me that Doctors and Dispensers may confuse "LEOCILLIN" and "LEDERCILLIN" in the case of prescriptions written hurriedly by hand or given by telephone. In my opinion there is no danger of such a mistake occurring as Doctors and Chemists are particularly careful in prescribing. Doctors and Chemists habitually make use of drugs having names which are closer to each other than are the words "LEOCILLIN" and "LEDERCILLIN".

So we have here the opinions of two qualified persons in the Colony and of three qualified persons in the United Kingdom. This does not help very much. It is pointed out that the drugs are usually sold to doctors, dispensaries and hospitals. Amongst these perhaps there would be little or no likelihood of confusion but we must go further. The actual dispensing and administration of these drugs is usually done by Chemists and by sisters and nurses in hospitals. It would perhaps have been helpful if some evidence had been obtained from these persons also. Mr. Wilson in his declaration has this to say, "It has been alleged on behalf of the applicant that since it is principally doctors who prescribe penicillin products the chances of confusion are remote. Actually, the mere fact that a man is a physician does not give him an infallible memory. Certainly, with the great advances in the field of medicine and pharmacy these days, a tremendous task in keeping abreast of the thousand of new products which are put out each year, and in choosing a trade mark it is the firm policy of my Company to exercise the utmost care in avoiding similarity with those of other companies, so as to lessen and not increase the heavy burden already upon the shoulders of the medical practitioner. It is urged that the applicant here would also be well-advised to adopt this policy. It is also pointed out that even assuming that doctors have some extraordinary and superhuman ability to avoid being confused by words as similar as these two, drugs of this kind are also dispensed, or administered, by chemists' assistants in shops, and by nurses and nurses' aides; and medicines are ordered from wholesalers, in hospitals, clinics, and the like, by persons utterly untrained in medicine and pharmacy. Obviously great harm might be caused if a doctor prescribed one medicine, of a certain strength and dose,

under a particular trade mark and the patient were to be given another medicine, having a confusingly particular trade mark. Apropos this, it should also be mentioned that doctors are notoriously poor in calligraphy, and if one scrawls the two words "LEDERCILLIN" and "LEOCILLIN" they look remarkably alike. Similarly, a busy physician may order a medicine over the phone, to be delivered to a patient's home; and it might be most unfortunate if the chemist's assistant, knowing my Company's mark well, delivered "LEDERCILLIN" if the physician really meant his patient to have "LEOCILLIN". Even to-day, phone connections are often imperfect, and such confusion might accordingly readily take place."

I have no evidence of confusion in actual use for there has as yet been no user in the Colony of the applicant's mark.

In their addresses, Counsel put forward certain points with which I must deal. Firstly, it was suggested that the goods to which the Trade Mark is applied are goods coming within the schedule to the Colony's Poisons Ordinance, but that the Registrar should consider that in the future these goods might be supplied freely to the general public, when the chance of confusion would be greater. I refer, in this connection, to the Judgment of Cohen, L.J., in *Bayer Products Ltd. v. A. Wander Ltd.*⁽²⁾ — there he says, "On the other hand I do not consider that I am constrained to take into account the possibility of an Amendment to that Act or Rules, having as its consequence that sulphadiazine preparations could thereafter be sold freely over the counter without a doctor's written prescription etc."

The question was raised as to whether the applicants had an honest intention to use their mark. I consider that there was no evidence to this effect and that the applicants answer—to the effect that they did in fact have such intention, but refrained from so using the mark pending a decision on their application for registration—was a fair one.

I must upon this evidence, and bearing in mind certain things and judgments set forth for my guidance, base my decision in the matter.

I have to bear in mind all the circumstances of the case, the type of person who will deal in the goods, the manner in which they will be dealt with, the fact that the terminal 'Cillin' is very commonly used in connection with a certain type of drug; that the marks must be compared as a whole, and that they should not be compared side by side, but separately by a normal person (Sarjant, J., in *Sadow Ltd.'s Application*⁽³⁾).

In this case, having in view the type of persons dealing in the goods, and bearing in mind the words of Cohen, L.J., it is clear that the person who deals in the goods are mainly doctors and chemists, who by the nature of their profession are careful people. At this point I must refer again to the Judgments in the *Bayer v. Wander*⁽²⁾ case mentioned above. It was there suggested that the ultimate user of the goods in question was the patient or the unqualified person who administered the medicines to patient and that the ultimate repository of the goods, before administration, was the medicine chest or cupboard, and that confusion was likely at this point. The learned Judges of Appeal dismissed this argument on the ground that if such confusion did occur it would be by a series of unlikely happenings and they saw no reason to assume such a curious combination of circumstances. I do however think that further consideration must be given to the matter here in the Colony. I have no doubt that a great proportion of the drugs in question will be sold by importers, to medical practitioners. They will be both administered and prescribed by these practitioners. Having been prescribed they will be dispensed by Chemists and administered by sisters and nurses in various hospitals and clinics. One local doctor and one local chemist have stated that in their opinion there would be a likelihood of confusion and although it is only their opinion, an opinion which they are qualified to hold by reason of their profession here. I must agree with this opinion. The great number of these chemists assistants, sisters and nurses are not so conversant with the English language as are the medical practitioners in the United Kingdom who explain that "Leo" means "Lion" and that "Leder" to German scholars, might mean "leather". This is no reflexion upon the qualifications of the local practitioners, chemists or nurses, but as a great number of these are Chinese, the fact remains that I must go further in my consideration of the type of person through whose hands the drugs will possibly go.

I have exhibited to a Declaration a bottle in which the drugs of the opponent are supplied. It is a small bottle and I myself am unable to read the word "Lederacillin" without the use of reading glasses and a certain amount of care. So far as I personally am concerned I can say that if the applicants were to use the word "Leocillin" in exactly the same way as do the opponents, I should have to exert care in differentiating one word from another. I can see no reason to assume that a great proportion of the people dealing in these drugs enjoy better eyesight than my own, which though not deserving of the description 'excellent' is certainly 'normal'.

There are certain other points which I have considered. Paragraph 5 of Mr. Wilson's declaration in my opinion contains much truth — there is likelihood that, in the future having regard to the progress made in the field of medical research, more and more drugs and preparations are likely to be available to the physician and chemist and it is in the public interest — and this I think must be studied — that there should be as little chance of confusion as possible between one preparation and another. In time of stress and emergency, drugs and similar preparations are administered by practically untrained personnel and this I feel is a fact that should be taken into consideration when exercising my discretion.

Finally, reference to *Medowell's Application*⁽⁴⁾ reminds me that I am in no obligation to proceed with an application where the matter calculated to deceive is *in dubio*.

I am certain of the honest intentions of the applicants, especially by the fact that they already have on the Register the Trade Mark "Leo", but I am not satisfied that they have proved to me — and the onus is on them to do so — that there would not be the likelihood of confusion if both of these marks were to be used upon similar goods.

It is well to explain more explicitly the term likely to cause confusion. It is not necessary to cause the customer to purchase one thing in mistake for another. In the words of Lord Justice Sarjant, the public will be equally deceived for all practical purposes if they merely identify or confuse the producers of 'A' with the products of 'B' whether they know the name of the producers of 'B' or not.

The words "LEOCILLIN" and "LEDERCILLIN" differ little in appearance, especially when shown in quite a small print, and phonetically they differ less still, and it is a common practise nowadays for producers to put upon the market a series of goods or type of goods under names bearing common prefixes or suffixes such as CIBA, CIBAZOL, CIBALGIN; CLINE-STROL, CLINTTEST, CLINIPEN; CORTATE, CORTELIN, CORTIRON; CORTONE and innumerable others.

Although I can assume that Physicians and Chemists are members of a profession who would exercise great care in their profession, I cannot grant to them a greater infallibility in memory or a more than ordinary ability in calligraphy diction or eyesight. The use and dispensation of these drugs by persons in the Colony, not being so proficient in English as perhaps they may be later, is partly dependent upon these things.

I do not consider that the applicants have discharged the onus, which is on them of proving to me that the mark is one that should be registered.

By virtue then of section 23 (1) of the Ordinance, and by the discretion granted to me, I decide that the application should not proceed.

Application refused.

GUTHRIE & CO., LTD. v. BRITISH INDIA STEAM NAVIGATION CO., LTD. & ORS.

[O. C. J. (Whitton, J.) August 3, 1953]

[Singapore — Suit No. 1047 of 1951]

Carriage of Goods — Bill of lading — Negligence — Liability of owners of ship and of lighter — Procedure.

The plaintiffs were at all material times the owners of 18,983 sacks of 50 lbs. flour which was shipped to Singapore by the "Carpentaria" belonging to the first defendants under a bill of lading dated February 13, 1951. On March 14, 1951 the "Carpentaria" was leaving a Singapore Harbour Board wharf when it came into collision with a lighter which had been hired by the second defendants and which had been engaged in receiving part of the flour cargo from the "Carpentaria" for transfer to the godowns. In consequence of this collision the lighter was partly submerged and some portion of the flour it had taken on was affected by water. The plaintiffs sued for non-delivery of 942 sacks of the flour consigned to them.

Held: (1) the evidence did not disclose any negligence on the part of either of the defendants; (2) neither of the defendants were liable for any breach of contract or negligence or as bailees as they were protected by the terms of the bill of lading as the goods had left the ship; (3) once a trial has started with a plaintiff and two defendants as parties it must be treated as one entire case. It would therefore be wrong for the Court to give a decision for the plaintiff at the close of the case for the first defendants without hearing the case for the second defendants.

Cases referred to:—

- (1) *Hummerstone v. Leary* (1921) 2 K.B. 664.
- (2) *Chartered Bank of India v. British India Steam Navigation Co. Ltd.* (1909) A.C. 369.
- (3) *Meyerstein v. Barber* (1866 — 1867) 2 C.P. 38.
- (4) *Elder, Dempster & Co. Ltd. v. Paterson, Zochonis & Co. Ltd.* (1924) A.C. 522.
- (5) *The Kite* (1933) P. 154 at p. 181.
- (6) *Gilbert Stokes & Kerr Prop. Ltd. v. Dalgetty & Co. Ltd.* 81 Ll. List L.R. 337.
- (7) *Waters Trading Co. v. Dalgetty & Co. Ltd.* (1951) 2 Ll. List L.R. 385.
- (8) *Nyalchand Motichand & Co. v. A. S. Mohamed Mydin; V. Varusay Rawther* (1952) M.L.J. 190.